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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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Summary

At this point in the proceeding, the applicants are to be evaluated solely under the standard comparative issue. Pursuant to that issue, David A. Ringer ("Ringer") and Wilburn Industries, Inc. ("Wilburn") are the only applicants which have no diversification demerit and are entitled to 100% credit for integration of ownership into station management. The record shows with regard to ASF Broadcasting Corporation ("ASF") that its non-voting shareholder will be able to control or influence the conduct of ASF's business as a practical matter and that there is no de jure limitation on his power or activities. Davis intends to sell her current business in order to meet her integration commitment, but is legally precluded from assigning the contracts on which her business is based. ORA does not even propose to integrate its ownership into management. If this case ultimately is resolved under the comparative alone, Ringer's (i) minimal quantitative enhancements would tilt the scales in his favor.

Introduction

The instant proceeding presently involves five applications for a permit to construct an FM station at Westerville, Ohio, to replace former Station WBBY-FM. They are to be evaluated herein solely under the standard comparative issue. Hearings pursuant to that issue were conducted on August 31, 1993, and the record was closed by the presiding Judge by Order, FCC 93-642, released October 8, 1993.

Findings of Fact

A. David A. Ringer

David A. Ringer ("Ringer") is an individual applicant who proposes, upon grant of his application, to relocate his residence to Westerville and be employed at his station as its full time General Manager. (Ringer Exh. 1, 2.) He moved to within his proposed service area in April, 1992, after filing his application. (Ringer Exh. 2, p. 1.)

Ringer initially claimed that his very limited civic activities between 1986 and 1991 (e.g., volunteering during Salvation Army Christmas Drives and Toys for Tots Drives) may have occurred within his proposed service area to the extent that he participated in them while at his home, but he later corrected his direct testimony to say that his residence was not within his

proposed service area during that period of time. (Ringer Exh. 2, p.1; Tr. 144-145, 276-277.) Thus, no credit is warranted for his activities.

Ringer was a newscaster at his college radio station in 1961-1962, and was employed as an announcer and production person at Station WLNO(FM), London, Ohio, between 1969 and 1972. (Tr. 159.) At WLNO(FM), he had a four-hour air shift during the week, a six-hour air shift on Saturdays, and did production work for the station's owner. (Tr. 159.)¹

Ringer proposes to divest his only mass media interest, in Station WYBZ(FM), Crooksville, Ohio, if his application is granted in this proceeding.

B. ASF Broadcasting Corporation

ASF Broadcast Corporation ("ASF") is a corporation with two shareholders: Ardeth S. Frizzell, who owns 250 shares of voting stock, and Thomas J. Beauvais, who holds 750 shares of non-voting stock. (ASF Exh. 1.) Frizzell has been employed in radio

¹ Ringer's direct written testimony (Ringer Exh. 2, p. 2) stated that he was "afternoon and weekend program director," but his testimony at hearing deflated this claim to management experience. He also has been minority shareholder, an officer and a director of the licensee of Station WYBZ(FM), Crooksville, Ohio, but this has not entailed any employment or other sort of significant broadcast experience. (Tr. 154-155, 158.)

since 1973, and held a management position at WBBY-FM, Westerville, Ohio, between 1990 and 1991. (ASF Exh. 3, p. 2.) She proposes to serve as her station's full time General Manager. She does not reside within ASF's proposed service area and does not seek credit for moving to ASF's service area after grant of her application. (ASF Exh. 2.)

Thomas Beauvais holds ownership interests in two existing radio stations, WBTZ(FM), Pinconning, Michigan, and WFGR(FM), Grand Rapids, Michigan. (ASF Exh. 2.) He was General Manager of WBTZ(FM) from the time he and his co-owners obtained the station until the corporate licensee turned over day-to-day operations to another entity pursuant to an LMA (local management agreement), and has been employed as General Manager of WBTZ(FM) since the time he and his co-owners obtained the license of that second facility. (Tr. 246-247.)²

The Shareholders Agreement between Frizzell and Beauvais provides that he alone will provide funds to construct and operate ASF's proposed station and that, as a practical matter, he will bear the entire cost of prosecuting its application from the hearing session onward. (Wilburn Exh. 3; Tr. 182-183, 185-

² Beauvais's ownership, but not his active management role, was revealed in ASF's direct written case.

187, 188.)³ He agreed to do so after meeting Frizzell once, for one hour over dinner at a restaurant, shortly before the filing deadline. (Tr. 191-193.) During their meeting, they did not discuss the business of the station, a proposed budget, the format, or even how much he would invest and how his money would be used. (Tr. 198-199, 203, 205.) Aside from discussing the percentage of equity she would hold, they also never spoke about the terms of their business arrangement. (Tr. 198, 206.) She merely took an agreement which had been prepared for a previous Beauvais project and, aside from raising her percentage from 20% to 25%, had her attorney copy it. (Tr. 194-195.)

At their single meeting, Frizzell and Beauvais did not discuss any limits on Beauvais's later involvement in station operations. (Tr. 208.) The Shareholders' Agreement which they signed shortly thereafter contains no restrictions concerning his future employment at the station, his serving as an independent contractor or agent, his ability to transact business in the name of the corporation, his participation beyond providing funds or securing loans, or communicating his wishes about the day-to-day operations of the station. (Wilburn Exh. 3; Tr. 206-207.)

³ Beauvais has agreed to invest or lend (Frizzell does not know which) up to \$196,000. (Tr. 187-188, 191.) Frizzell already has contributed \$12,000, the only amount required of her. (Tr. 182-183, 188.) She also is totally dependent on Beauvais's willingness to provide the funds necessary to build and operate the station, because she herself has less than \$25,000 in total available funds and cannot otherwise hope to finance the project. (Tr. 178-179, 181, 209.)

C. Wilburn Industries, Inc.

Wilburn Industries, Inc. ("Wilburn") is an Ohio corporation which is authorized to issue 375 shares of voting stock and 375 shares of non-voting stock. All shares authorized have been issued: Charles W. Wilburn has been issued 375 shares of voting stock; Bernard P. Wilburn has been issued 375 shares of nonvoting stock. Charles W. Wilburn is President, Secretary, Treasurer and the sole Director of the applicant. Bernard P. Wilburn, the son of Charles Wilburn, is neither an officer nor a director of the company. Charles W. Wilburn and Bernard P. Wilburn also have executed an Agreement of Shareholders, which precludes Bernard Wilburn from participating in the operations and business of Wilburn's station. (Wilburn Exh. 1.)

If the application of Wilburn Industries, Inc. is granted, Charles Wilburn will be employed at its radio station on a full-time basis, at least 40 hours per week, as its General Manager. As General Manager, he will oversee the day-to-day operations of the station, supervising its programming (including public service programming), sales, promotional and internal administrative activities. He will be responsible for the hiring, promoting and termination of employees, and will oversee the implementation of the station's EEO program. (Wilburn Exh. 2, p. 1.)

If the Wilburn Industries, Inc. application is granted, Charles Wilburn will move his residence to Westerville, Ohio, which lies approximately nine miles from his current residence. He also will terminate his current practice of law in Circleville, Ohio, and will limit any other business activities which could conflict with his commitment to the station. (Wilburn Exh. 2, pp. 1-2.)

Wilburn Industries, Inc. and its two shareholders have no interest in or connection with any radio or television broadcast station or any other medium of mass communications. (Wilburn Exh. 1.)

D. Shellee F. Davis

Shellee F. Davis ("Davis") is an individual applicant who has resided within her proposed service area since 1984. (Davis Exh. 1, p. 1.) She is a member of the black minority. She has participated in a number of civic activities in Columbus, Ohio, a portion of which city lies within the contours of her proposed station. (Davis Exh. 1.) She proposes to work at her station as its General Manager on a full time basis. (Davis Exh. 1, p. 1.)

Davis presently owns and operates Britt Business Systems, Inc. ("Britt"), which distributes office equipment for Panasonic Industrial Company ("Panasonic") and Xerox Corporation ("Xerox"). (Davis Exh. 1, p. 2; Tr. 377.) Her company, which she owns free and clear of any mortgage, had gross revenues of \$1,200,000 in 1991, and gross revenues of \$1,400,000 in 1992. (Tr. 377, 382.)⁴ To effectuate her integration proposal in this proceeding, she intends to sell Britt for its market value, and has no plans other than to sell it. (Davis Exh. 1, p. 1; Tr. 386, 389.) The value in Britt is its authority to sell or lease Panasonic and Xerox equipment pursuant to contracts with those companies, and she believes that she will be able to assign these rights to a prospective purchaser. (Tr. 389-390, 393, 397.) She has not tried to market Britt, however, and -- contrary to her assumption -- her contracts with Panasonic and Xerox are not freely assignable. (Ringer Exh. 5, para. 16; Exh. 6, para L 1.1; Tr. 394-396, 398.) To the extent that Britt's contract with Xerox recites that such contract may be assigned only if Xerox gives its prior consent, Davis has not received such consent and,

⁴ Davis means to rely on bank financing to meet the construction and operation costs of her station. She has no idea of the past income of WBBY-FM (the station she intends to replace), of advertising revenues in the market as a whole or of the profitability of stations in the market. (Tr. 381.) She has no idea other than a general "feeling" as to when the mortgaged station will turn a profit, and has never done a market study or looked at any figures relating to past or potential revenues. (Tr. 384-385.) That is, she relies on no more than an "intuition" that the station will "work." (Tr. 385.)

indeed, has never explored the matter with that supplier. (Tr. 398.)

E. Ohio Radio Associates, Inc.

Ohio Radio Associates, Inc. ("ORA") has no attributable media interests and proposes no integration of ownership into management. (ORA Exh. 1, p. 1.)

Conclusions of Law

A. Ringer

Ringer merits 100% integration credit, as minimally enhanced by his post-filing residence within his proposed service area and non-managerial, short-term broadcast employment over two decades ago. He suffers no demerit under the diversification criterion.

B. ASF

The record establishes that ownership in ASF must be attributed to its 75% shareholder, Thomas Beauvais, as well as to Ardeth Frizzell. His financial dominance, the brief and insubstantial meeting between him and Ardeth Frizzell which preceded his agreement to provide essentially all of the funding for the project, the failure to even discuss any limitation on

his future involvement in the station's business affairs, and the complete absence of any such restrictions in their Shareholders' Agreement -- all mandate the conclusion that, at best, ASF may be accorded 25% integration credit for Frizzell's proposal to serve as its General Manager. Beauvais's past pattern of ownership/management and the use of a previously-prepared, non-negotiated agreement between Beauvais and Frizzell further buttress this conclusion.

In light of the foregoing, ASF also must be assessed a substantial demerit for the other broadcast interests held by Beauvais.

C. Wilburn.

Wilburn has demonstrated that it is a bona-fide applicant whose voting shareholder will be the only principal with any involvement in the day-to-day conduct of the station's operations and business. It therefore merits 100% integration credit for the proposal by Charles Wilburn to manage its station on a full time basis. Such credit is enhanced by his commitment to relocate his residence to within the community license once Wilburn's application is granted. The applicant has no other media interests and warrants a preference under the diversification criterion, as well.

D. Davis

The Commission requires that an applicant seeking credit for integration of ownership into station management establish that such plan can and will be effectuated. While it strains credulity that Davis will trade a successful business enterprise which she owns for a mortgaged one whose financial prospects she has not even explored, a conclusion need not be premised on that basis alone. Rather, her integration proposal is predicated on the presumed sale of her current business enterprise, and she has not shown that she will in fact be able to accomplish such sale. To the contrary, such sale is explicitly proscribed by her contracts with her suppliers, and she has made no effort or inquiry to determine whether those suppliers will waive the provisions of their contracts and simply accept the substitute she proffers.⁵ Her assumption that the other parties to her contracts will simply go along with whatever unilateral arrangements she may make is unsupported, speculative and improbable. In comparable circumstances, the Commission has held that an applicant has an affirmative obligation to establish that it can effectuate its integration proposal, and that an applicant therefore cannot merely assume without support that the express

⁵ The critical significance of these restrictive conditions is obvious. The suppliers, who would have to rely on the ability and character of the assignee, may well evaluate a potential franchisee far differently than would Davis, who would simply be accepting the best price offered.

language of a contract will be waived or disregarded. Cf., Swann Broadcasting Limited, 6 FCC Rcd. 17, 68 RR 2d 1164 (Rev. Bd. 1990); Washoe Shoshone Broadcasting, 3 FCC Rcd. 3948, 64 RR 2d 1748 (Rev. Bd. 1988).

E ORA

ORA has no other attributable media interests. It also has no other comparative attribute of any sort.

Ultimate Conclusion

At this point in the proceeding, and absent remand on issues which previously have been requested, it must be concluded that Ringer is the best-qualified of the applicants on a comparative basis, with Wilburn ranked closely behind, given the facts that both have no diversification demerits, that both have earned 100% integration credit, and that Ringer's qualitative preferences are of a minimal nature.

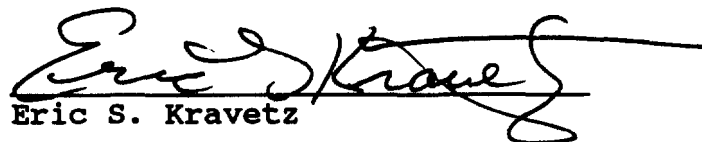
ASF suffers from a significant, and dispositive, diversification demerit and, in any event, may receive no more than 25% integration credit. While Frizzell's qualitative attributes might enhance such credit somewhat, such enhancement is not great and cannot offset either the low percentage of integration or the diversification demerit. While Davis and ORA

have no diversification demerits, they also can receive no
integration credit, which takes them equally out of the running.

Respectfully submitted,

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October 25, 1993

CERTIFICATE OF SERVICE

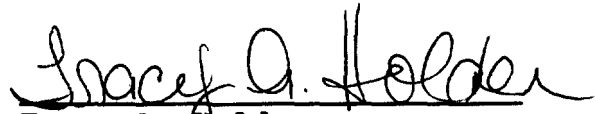
I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 25th day of October, 1993, I caused copies of the foregoing "Proposed Findings of Fact and Conclusions of Law" to be delivered by first class mail, postage prepaid, to the person named below:

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